In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. . . . . .

TESTAMENTARY TRUST u/w OF SAMUEL MATHER,
Deceased,
William G. Mather and S. Livingston Mather,
Trustees,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Tax Court of the United States is a memorandum opinion and is not reported. It is printed at pages 175 to 184 of the Record. The opinion of the Circuit Court of Appeals is reported at 149 Fed. (2d) 393, and it is also printed at pages 199 to 205 of the Record.

JURISDICTION.

The statutes under which the jurisdiction of this Court is invoked are referred to in the petition for certiorari at page 2 above.

STATEMENT OF THE CASE.

A statement of the case is set out in the petition for certiorari (*supra*, pages 2 to 8) and will not be here repeated.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred in each of the following particulars:

1. In extending the doctrine that the income tax laws are to be applied to "the substance of the thing done" in a form which applies such laws to a purely fictitious, theoretical situation flatly inconsistent with the stipulated facts, the findings of fact and the actualities of the things done.

2. In disregarding the "essential truth disclosed" by the stipulated record and the findings.

3. In failing to allow petitioner the deduction for a bad debt which it sustained and which deduction was allowable on the actual facts and substance disclosed by the record, in accordance with the simple, unconditional provisions of Section 23 (k)(1) of the Internal Revenue Code and all decisions of other Circuit Courts on the subject.

A. The Circuit Court Erred in Testing Petitioner's Right to the Deduction Claimed on the Basis of a Hypothetical Transaction (Never Carried Out) and in Disregarding the Actual Substance of the Transaction (Actually Carried Out) as Disclosed by the Stipulated Record and Findings.

This Court has repeatedly held that the Internal Revenue Laws are to be applied to the actual "substance of *the thing done*" rather than form; that the effort must be to regard "*the essential truth disclosed*"; that the "substance" to be regarded is the real actuality of the thing actually "*done,*" not a theoretical equivalent which was not "done"; and that to take the "symbol" for the "substance" violates the rule.

The leading decisions of this Court on the subject are *Eisner v. Macomber,* 252 U. S. 189, and *United States v. Phellis,* 257 U. S. 156.

In the *Eisner* case a stock dividend (involving a partial capitalization of the corporation's surplus) was held by the Commissioner to be a distribution to stockholders on the theory that, in substance, the transaction involved the pay-

ment of a cash dividend and the reinvestment of such dividend in new stock. This Court held such an assumed substance to be contrary to the actualities disclosed by the record, and not a proper application of the principle here discussed. At page 213 it said:

> "We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. *But, looking through the form, we cannot disregard the essential truth disclosed; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon stockholders as partners, when they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized.*" *

In commenting upon a decision of the Supreme Court of Massachusetts, sustaining a state income tax on a stock dividend on the ground that the substance of the transaction was the same *as it would have been* if a cash dividend had been declared and the privilege given to subscribe for new shares, this Court further said at page 217:

> "We cannot accept this reasoning. Evidently, in order to give a sufficiently broad sweep to the new taxing provision, it was deemed necessary to take *the symbol for the substance*, accumulation for distribution, capital accretion for its opposite; * * *"

In the *Phellis* case, *supra*, a corporation transferred substantially all of its assets to a new corporation for debenture stock and then distributed such stock to its shareholders as a dividend. The Court of Claims observed that the shareholders' total holdings had not substantially changed in value and "held that the whole transaction was

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* Emphasis throughout this brief is ours.

to be regarded as merely a financial reorganization of the business of the company, producing to him (the shareholder) no profit and hence no income, and that the distribution was *in effect* a stock dividend non-taxable as income under the authority of *Eisner v. Macomber,* 252 U. S. 189 * * *."

This Court, affirming "the importance of regarding matters of substance and disregarding matters of form," overruled the decision of the Court of Claims *as an attempt to substitute for the real, actual substance a theoretical equivalent.*

The *Eisner* and *Phellis* cases were followed by the Circuit Court of Appeals for the Fourth Circuit in *McDonald v. Commissioner,* 52 Fed. (2d) 920 and *Henrietta Mills Inc.,* 52 Fed. (2d) 931.

In the former case the taxpayers had acquired the stock of a coal company at a price based on the value of its assets and the outcome of its accounts receivable and liabilities. The property of the company was subsequently sold at a price equal to the cost to the taxpayers of the stock of the company and which was in excess of the cost of the property to the company. The stockholders claimed that form should be disregarded and that the transaction should be treated as though, in substance, they had bought and sold the property. There is little question under the facts but that, the net effect was in substance as if they had done so. The Court reiterated that, "looking through the form, we cannot disregard the essential truth disclosed," and held that the corporation, having had actual existence, could not be disregarded.

The *Henrietta Mills* case, *supra,* involved a contract to buy stock of a company,—one quarter immediately at a certain price and each of the remaining three quarters in annual installments—the price of each subsequent quarter being 6% greater than that of the previous quarter. It was contended that in substance the 6% amounted to in-

terest on the deferred payment and should be so treated for tax purposes. Obviously this was the net equivalent of the transaction. However, the Court reiterated that "tax liabilities must be determined by what *in fact was done*" and held that to construe the contract as in substance requiring interest would be to make a new contract for the parties which it declined to do.

In the instant case the Circuit Court correctly stated the rule:

> "that the substance *of the thing done* and not the form it took, must govern,"

but proceeded to disregard both the form and the substance of *"the thing done,"* and to substitute therefor a purely fictitious, theoretical situation.

The Commissioner stipulated to the actuality of the following facts, and nothing in the record or findings throws any doubt thereon:

> The Estate Company was *duly* organized; its assets "duly" transferred to it and its obligations "*duly*" assumed in a tax-free transaction in which no gain or loss was recognized. The executors were "*duly*" released from the liabilities. They sold certain preferred shares of the Estate Company but distributed in kind to the legatees most of the shares of the Estate Company. They did not distribute to the legatees any of the assets or liabilities taken over by the Estate Company. Shortly after such transfers Mather's estate was wound up and the executors discharged. In December 1938 the Estate Company "duly adopted and carried out" a plan of complete liquidation in accordance with Section 112 (b) (7) of the Revenue Act of 1938 (which by the terms of that Act could have been done only by a real corporation with the concurrence by formal agreements of real stockholders). By the formal agreements in that connection there was "duly" transferred to petitioner assets of large stipulated value, and, by formal contract with the company and its creditors, petitioner duly and without limitation

assumed its share of the obligation on the Accommodation Note and other secured obligations. In 1939 petitioner paid some $49,000 of its own money on the Accommodation Note and deducted as a bad debt the amount for which Bishop thereby became indebted to it. Mather's executors and estate which had long since been wound up did not make such payments and acquired no debt against Bishop.

Nevertheless, the Circuit Court affirmed the finding of the Tax Court that "the petitioners may claim no position other than that of residuary legatees" and that their right to a deduction for a bad debt was to be determined as if Mather's estate had been administered in customary manner, his debts paid by the executors and the net residue distributed by them to petitioner.

The Circuit Court's summary of the Tax Court's conclusion (R. 201, 202), which it affirmed, is printed in the margin for the convenience of the Court.*

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* "* * * The tax court assumed that the legal relationship which arose as between Mather and Bishop, was that Bishop was accommodated by Mather and that the latter had a right over against Bishop immediately upon, but not until his response under the note. It also assumed that when the note was given Bishop was solvent, and it found, as a fact, that Mather did not make a gift to Bishop as a consequence of the transaction. It concluded, however, that notwithstanding the rather elaborate and unusual method adopted and carried out in connection with the payment of Mather's debts and the distribution of his estate, *the petitioners may claim no position other than that of residuary legatees of the estate*, and do not stand in the place and stead of Mather. Their status is not analogous to that of an assignee succeeding to the rights of his assignor and subject to his liability. *Residuary legatees have no interest in a decedent's estate other than the right to receive their allotted interest* therein after the payment of all charges imposed by law and by the testator in the way of specific bequests and annuities, and that among the charges imposed by the law are the debts of the testator to which his whole estate must respond under applicable Ohio law. The duty to discharge such debts rests upon the executor. *Had Mather's estate been administered in the customary manner the petitioners would have made no payments upon the joint note, for the indebtedness would have been discharged before any rights in the estate had ripened in their behalf and before receipt of their distributive shares.*"

The Circuit Court's own conclusions (R. 203, 204) are summarized in the following:

> "The net result of the whole arrangement, realistically viewed, is that the petitioners received their interest in the Mather Estate as residuary legatees even though distribution had been postponed by an arrangement which had no purpose other than to save them from a forced liquidation in an inopportune period. The entire transaction, whatever its form, was essentially, in intent, purpose, and result, the protection of creditors and the residuary legatees in their rights respectively to the assets of the estate, and whatever may have been the transitory legal title to such assets, either in the Executors, in the corporation, or as represented by stock, the purpose of the mechanics adopted was the payment of Mather's debts and the distribution of his property to legatees under the will * * *.
>
> "That corporate ownership extended over a term of years does not deprive such ownership of its transitory character. The period of corporate life was controlled by the economic necessities of the times, and not by the unfettered will of the parties interested. It, therefore, in our judgment, is immaterial that in achieving without loss the payment of Mather's debts, in saving the interests of the legatees in the estate, such interests were, for a time, transformed from bequests to corporate stock and then from corporate stock to corporate assets. *What the petitioners received,* over and above what they paid out, *were legacies provided by the will of Mather* and *it is unimportant whether Mather's debts were paid by the executors, the corporation, or the legatees.* * * *"

All this in spite of the fact that the Court said (R. p. 202):

> "The petitioners, however, insist, and *the tax court concedes,* that Mather's estate was *not* so administered; that the manner of administration was forced upon them by urgent financial and business necessities; was adopted in good faith without tax-dodging

purpose, and *that the deductions claimed are precisely those which would have been allowed to Mather if he had lived, or to the estate if it had continued to administer.*"

Thus, in one breath it is conceded that Mather's estate was not administered in customary manner and in the next it is said that all of the stipulated realities are to be disregarded and petitioner taxed "as if" Mather's estate had been administered in customary manner.

From 1934 on the executors, the probate court, the Estate Company, its creditors and its stockholders, the Commissioner of Internal Revenue and all other parties concerned, dealt with the stipulated actualities as actualities. Based on such actualities large amounts of property were held and transferred; debts were paid; the corporation and stockholders made tax returns, the executors made their final tax returns and were discharged; the statutory corporate liquidation was "duly" carried out with the necessary agreements of the stockholders (as corporate stockholders) with reference to the tax consequences thereof. (See Section 112 (b)(7) and the Commissioner's regulations thereunder; CCH 1939 Federal Tax Service, pars. 734B to 734I, inclusive.)

If the real substance and actuality of these transactions was that the executors liquidated the estate and distributed the net assets to the legatees, what is to happen to all of the executors', the Estate Company's and the stockholders' tax returns for these five years?

If the real "substance of the thing done" was, for the purpose of now governing the stockholders' tax returns, a customary administration of Mather's estate, then that must have been the real substance of the thing done for the purposes of the tax returns of the executors and the Estate Company and for the stockholders in connection with the liquidation under Section 112 (b)(7). No such liquidation occurred. The stockholders' agreements under

that statute are fictitious,—as is the Commissioner's stipulation.

"Substance" is the real, legal and practical actuality of "*the thing done.*" It is not (under this Court's decisions) what the Commissioner, the Tax Court or a reviewing Court may determine to be *a substantive equivalent of what was done.*

If the rule is now to be changed from "*the substance of the thing done*" to what the Commissioner or a court may determine to be a *substantive equivalent of the thing done,* then endless confusion and uncertainty will be injected into the administration of the tax laws. In almost every business transaction the general purpose and result sought can be legally and properly accomplished in a variety of ways. A trust, partnership or syndicate can often be substituted for a corporation or vice versa. All of a corporation's assets can be purchased or its stock can be purchased. Estates can be liquidated into net cash or assets can be distributed in kind, with or without full satisfaction of the estate's obligations depending upon creditor's consent.

If, after a definite, legal and proper procedure (not a sham procedure or one adopted for tax dodging purposes) is decided upon and "duly carried out" by a taxpayer, and the Commissioner so stipulates, we must still await the varied determinations of the Tax Court and a reviewing Court as to what taxpayer might have done to accomplish the same purpose and result (the substantive equivalent of what he did do), the variations and uncertainties in tax results will be limited only by the scope of the imaginations of the judges who consider the matter.

We submit that this Court, when it adopted the rule of "substance versus form," intended to sanction no such result.

We also submit that the decision of the Circuit Court (holding as it does that the "substance of the thing done"

"was essentially" the payment of the debts of the estate by the Executors and the distribution of the net proceeds to "the residuary legatees" as "legacies provided by the will of Mather" when, under the stipulated actualities, the Executors did not do so, and petitioner alone made the payment on the Accommodation Note and acquired the debt against Bishop here in issue), is in conflict with the decisions of this Court in the *Eisner* and *Phellis* cases, *supra*, and should be reversed.

The Circuit Court's disregard of the stipulated actualities is also in direct conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in the *McDonald* case, *supra*, and in the *Henrietta Mills* case, *supra*—its disregard of the stipulated existence and "duly" effected transactions of the Estate Company being in particularly direct and irreconcilable conflict with the decision in the *McDonald* case.

B. On the Stipulated Record (Disregarding the Fictitious Substance Created by the Courts Below) Their Decision is in Conflict with Established Law and Decisions of Other Circuits.

Section 23 (k)(1) of the Internal Revenue Code allows, in simple unconditional form, to all taxpayers, deduction for worthless debts. The deduction is not limited to particular classes of taxpayers, nor to business or other particular kinds of debts. (5 *Mertens Law of Federal Income Taxation*, 1942 (Sec. 30:01).)

The basic problem "is to determine whether the taxpayer is owed a debt" or whether the transaction involved a gift or a voluntary payment under which no debt to it arose. *Mertens*, Sec. 30:01; Sec. 30:04.

> "If there is a debt in fact and in law, the taxpayer will not be denied the deduction because the loan is not a 'wise' loan."
>
> *Mertens*, Sec. 30:10.

The undertaking of an accommodation obligation as maker or endorser gives rise to no debt from the accommodated party, but such debt does arise when, but not until, the accommodation party makes payment on the accommodation debt.

Bendey v. Townsend, 109 U. S. 665 (1883);
Wheeler v. Young, 193 Mass. 143 (1886);
Runkle v. Pullen, 49 Indiana Appeals 616 (1912);
Grygiel v. Maroille, 51 R. I. 109 (1930).

The same is also the law where the payment is made by the successor in liability to the accommodation party.

Burton v. Slaughter, 67 Va. 914 (1875);
Nelson v. Close, 147 Md. 214 (1925).

In the instant case it cannot be, and is not, questioned that a debt from Bishop to petitioner arose when petitioner, in 1939, made the stipulated payments on the accommodation debt. That such a debt did so arise in fact and in law is demonstrated (a) by the foreging principles which caused it to arise as a matter of law, it being expressly stipulated that "no gift was made or intended"; (b) by the formal contract with Bishop confirming his primary liability and his agreement to repay with interest any amounts paid on the accommodation obligation by the Estate Company or its successors; and (c) by the concessions of the Tax Court, confirmed by the Circuit Court,

> "that the deductions claimed are precisely those which would have been allowed to Mather if he had lived, or to the Estate if it had continued to administer." (R. 202.)

And by the Circuit Court's finding:

> "The petitioners contend that Mather was simply an accommodation maker of the joint note executed by himself and Bishop; that as such he had an inchoate right to recover from Bishop any amount which he might be required to pay thereon; that the petitioners

> succeeded to that right; that it was brought to fruition by the payments made by them in 1939; and that Bishop being then insolvent, they became, immediately upon payment, entitled to a bad debt deduction. *As to the steps in this rationalization, short of its final conclusion, there is no controversy.*" (R. 201.)

The Circuit Court of Appeals for the Second Circuit, in *Shiman v. Commissioner*, 60 Fed. (2d) 65 (1932), held that the right of an accommodation party to take deduction for the debt due him which arises when he makes payment upon an accommodation obligation, is in no way destroyed or restricted by the fact that the debt may be worthless when it arises.

In the thirteen years that have elapsed since the decision in the *Shiman* case, *supra*, the rule there laid down has been consistently applied by the Board of Tax Appeals and by other Federal Courts.

That a transferee taxpayer, who has assumed an obligation, is not to be taxed with respect thereto on a different basis from other taxpayers where the statute providing for the deduction in issue does not provide for any different treatment of a transferee, is now expressly confirmed by the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Breyer* and companion cases, *supra*.

In the instant case the Circuit Court made a collateral attempt to distinguish the *Shiman* case on the ground that petitioners were not in Mather's position because their assumption of the accommodation debt

> "was tied to and limited by their distributable share in corporation assets, and such assets were the actual or converted assets of the Mather estate and none other." (R. 203.)

To the extent that this involves the fictitious assumption that Mather's estate paid the Accommodation Note and distributed the net assets, it is discussed under "A" above.

To the extent that it might otherwise indicate a finding that petitioner's assumption of the accommodation obligations in connection with the 1938 liquidation of the Estate Company was so limited, it is flatly contrary to the stipulated record and supported by nothing in the record.

It is stipulated that the Estate Company "was completely liquidated under and pursuant to a Plan of Complete Liquidation duly adopted and carried out * * *." (R. 50. *Section 1* of that Plan (R. 114) expressly provided for the execution and delivery of a necessary Amendment to the Mortgage Trust Indenture, which secured the payment of the Accommodation Note and other notes of the Estate Company, by the Company's common stockholders (including the petitioner). (Ex. I to Plan, R. 116.)

Section A of that Amendment (R. 118) provided—

> "Each of the parties of the Third Part (petitioner and others) hereby assumes and agrees, for the benefit of the holder of each note secured by said Indenture, to pay that proportion of each debt and obligation of the Corporation represented by each note secured by said Indenture, or under or arising from said Indenture as hereby supplemented and amended, as the number of common shares of the Corporation held by him is to the total number of the common shares of the Corporation as set forth in Recital 2 hereof." *

It is thus clear that petitioner's assumed liability with respect to the Accommodation Note was in no way qualified, or limited to its distributive share of the assets of the Estate Company. It had to pay what Bishop didn't, even if it took every asset it owned.

If the Court below intended to go beyond its fictitious reconstruction of "the thing done," it is possible that it was misled by *Section 4* of the Plan of Liquidation (R. 114) in which it was *also* provided that each common stock-

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* There were 1,000 shares of such common stock outstanding, of which 62½ were held by petitioner. (R. 117.)

holder should assume and agree to pay, "but only out of assets distributed to him," his proportion of *every* debt or obligation of the Estate Company. This was, of course, a limited assumption of the Company's *general liabilities. Its existence, however, could not and did not in any way, in fact or in law, impair or limit the full, personal, unconditional and unlimited assumption of the Accommodation* and other secured note obligations undertaken by petitioner *through its execution* with the Company and *its creditors* (in accordance with Section 1 of the Plan) of the Amendment to the Mortgage Trust Indenture as above recited.

It is thus clear that neither reason given by the Circuit Court for departing from the established rule of the *Shiman* case finds support in fact, form or substance of the thing done.

The basic provision of Section 23 (k)(1) for the allowance to all taxpayers of deductions for worthless debts has stood in the Internal Revenue Code without material amendment for many years. It has been applied to all taxpayers without distinction and subject only to the basic test,—Was there in fact and in law a debt owed to taxpayer and did it become worthless? In re-enacting such provision of the Code, Congress has re-affirmed such interpretation.

Similarly, the basic rule laid down by this Court in the *Eisner* and *Phellis* cases, that the Internal Revenue Laws are to be applied to the actual, existing substance of "*the thing done,*" has been accepted by Congress by its repassage of the Internal Revenue Laws without change in this regard.

The decision of the Court below in the instant case either (1) throws unlimited confusion into the interpretation and application of this rule of substance, or (2) it creates equal confusion and uncertainty as to the meaning and application of the simple provision of Section 23 (k)(1).

Actually, as the decision stands, it is clearly and directly in conflict with the decisions of this Court and with those of other Circuit Courts on the rule of substance; and, unless that conflict is resolved in favor of the Court below, then its interpretation and application of Section 23 (k)(1) is in conflict with all previous decisions on the subject.

Various cases cited by the Court below as authority for its position are discussed in the appendix.

CONCLUSION.

Because the decision of the Circuit Court in the instant case is in conflict with the decisions of other Circuit Courts, and because the Circuit Court has decided a federal question in a way in conflict with the applicable decisions of this Court, petitioner requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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